

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAMON O. DOMINGUEZ,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-06-1970
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Ramon O. Dominguez has filed a petition for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254.¹ Having considered the parties' submissions and all matters of record, the court recommends that respondent's motion for summary judgment (Dkt. 14) be granted and petitioner's application be denied.

BACKGROUND

On July 25, 2003, a jury found Dominguez guilty of first degree murder and assessed punishment at fifty-five years in prison. The Fourteenth Court of Appeals affirmed Dominguez's conviction on November 2, 2004. Dominguez filed a petition for discretionary review, which the Texas Court of Criminal Appeals refused on May 25, 2005. Dominguez filed an application for state writ of habeas corpus on August 12, 2005. On May 24, 2006, the Court of Criminal Appeals denied the application without written order on the findings of the trial court without hearing. Dominguez filed the instant federal petition for writ of

¹ The district court has referred this matter to this Magistrate for report and recommendation (Dkt. 5).

habeas corpus on June 2, 2006.²

ANALYSIS

Dominguez seeks federal habeas relief on the following grounds:

- (1) the trial court erred in allowing the prosecutor to characterize the shooting at issue as “murder” during questioning of the victim’s 15-year old daughter;
- (2) the trial court erred in giving a jury charge that included a definition of “reasonable doubt;” and
- (3) he received ineffective assistance of counsel because his trial attorney failed to:
 - (a) preserve trial error for appeal related to the prosecutor’s prejudicial use of the term “murder”;
 - (b) failed to properly investigate alternative causes of death;
 - (c) failed to present expert testimony on accidental death;
 - (d) failed to (i) advise him on and (ii) pursue a jury charge on a lesser included offense; and
 - (e) failed to object to the improper jury charge on “reasonable doubt.”

Dominguez’s petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Dominguez is not entitled to federal habeas relief on his claims that were adjudicated on the merits³ in state court unless the state court adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

² Respondent does not contend that Dominguez’s petition is time-barred.

³ A denial of habeas relief by the Texas Court of Criminal Appeals constitutes a ruling on the merits of the application. *In re Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

28 U.S.C. § 2254(d). A state court decision may be “contrary to” federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite of the Supreme Court on a question of law, or if the state court “confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent” and reaches an opposite conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court decision involves an “unreasonable application” of federal law if the state court “identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. Federal habeas relief is warranted only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

1. Lack of Exhaustion on Ineffective Assistance Claims

Section 2254(b)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a petitioner is not entitled to federal habeas relief unless:

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B) (i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The exhaustion requirement is met if a habeas petitioner has “fairly presented” the substance of his claim to the state courts. *Moore v. Quarterman*, 454 F.3d 484, 491 (5th Cir. 2006). In order to have been fairly presented, petitioner must have made more than a bare assertion of his claim in his state habeas petition. *Id.*

A federal court may not grant habeas relief where some claims in the petition are unexhausted. *Rhines v. Weber*, 544 U.S. 269, 274 (2005). However, where claims are time-barred or otherwise without merit, the court may deny relief despite the lack of exhaustion. 28 U.S.C. § 2254(b)(2).

Respondent contends that Dominguez did not raise certain of his ineffective assistance of counsel claims in the state court either on appeal or on habeas review, and thus he has not met his burden to exhaust his state court remedies as to those claims. Specifically, the respondent contends that Dominguez has not exhausted his claims that his counsel was ineffective because he failed to present expert testimony on his accidental shooting defense, failed to object to the jury charge definition of reasonable doubt, and failed to pursue a lesser included offense jury charge (grounds 3(c), (d)(ii), and (e) above).

Dominguez did not raise any issue related to ineffective assistance of counsel on appeal. In his state habeas application, Dominguez contended that his counsel was ineffective for failing “to properly investigate the facts of the case concerning different theories as to the cause of death of the victim,” failing “to present expert witnesses during case in chief that may have shown other theories of cause of death,” and failing to “make applicant aware of the applicable law pertaining to this case in the areas of probation, lesser included offenses, and accident.”⁴ Dominguez clearly has not exhausted his state remedies as to his counsel’s failure to object to the definition in the jury charge of reasonable doubt and failure to request a lesser included offense jury charge.

⁴ WR-63,502-01, at 13.

The record is murkier with respect to Dominguez’s claim regarding expert testimony. Respondent apparently reads Dominguez’s reference in his state habeas application to counsel’s failure to present expert testimony as to “other theories of cause of death” to mean theories that the victim died from some cause other than by a gunshot wound to the head, and not to include the theory of accidental death. Dominguez did not explain to the state court what he meant by “different theories as to the causes of death.” However, while it is not clear precisely what issue he intended to raise in his state habeas application, it is plain that he did not fairly present to the state court the issue of expert testimony on *any* theory. Dominguez made only a brief, conclusory assertion as to his ineffective assistance claim based on lack of expert testimony, and offered no specifics or evidentiary support for it. Dominguez’s state habeas brief argued only the issue of his counsel’s ineffectiveness related to the prosecutor’s use of the word “murder” during the trial. Dominguez did not do enough to exhaust this claim. *See Summers v. Dretke*, 431 F.3d 861, 880 (5th Cir. 2005) (applicant’s allegation of the claim, without argument, is not enough).

In sum, Dominguez has not exhausted his ineffective assistance of counsel claims based on the failure to present expert testimony on an accidental shooting defense, failure to object to the jury charge definition of reasonable doubt, and failure to pursue a lesser included offense jury charge. Because a further state court habeas application would be considered successive,⁵ those claims are procedurally barred and must be denied with prejudice. *Ruiz v. Quarterman*, 460 F.3d 638, 643 (5th Cir. 2006); 28 U.S.C.

⁵ TEX. CODE CRIM. PRO. art. 11.07 § 4.

§ 2254(b)(1)(B).⁶

2. Remaining Ineffective Assistance Claims

The Supreme Court has established a two-part test for determining ineffective assistance of counsel habeas claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was "deficient." To do this, a defendant must point to specific errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The court's scrutiny of counsel's performance is highly deferential; the court presumes that counsel's conduct falls within the wide range of reasonable professional assistance. *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

Second, a defendant must demonstrate that his counsel's performance prejudiced his defense. *Id.* In other words, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.*; *see also United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) ("the focus here is whether a reasonable probability exists that counsel's deficient performance affected the outcome and denied [the defendant] a fair trial."). In establishing an ineffective assistance of counsel claim, a defendant cannot merely present conclusory allegations. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Rather, the defendant must allege "specific facts" to support his claim. *Id.*

Dominguez has not met his burden to show that his counsel's failure to preserve error related to the prosecutor's use of the term "murder," failure to fully investigate alternative

⁶ Such claims also fail on the merits for the same reasons as Dominguez's other ineffective assistance of counsel claims. *See infra* at 6-7.

causes of death, and failure to advise him of the law on lesser included offenses, meet the *Strickland* standards. First, his trial counsel did object to the prosecutor's characterization of the shooting as murder during the testimony of the victim's 15-year old daughter, but was overruled by the court before he was able to fully articulate the basis for his objection. Second, as petitioner concedes, the only issue at trial was his intent because he admitted that he shot the victim. Therefore, there was only one plausible cause of death. To the extent that by "alternative theory" Dominguez means the theory that the shooting was an accident, counsel pursued that theory in his questioning of Dominguez and in his cross-examination of the state's expert. Third, Dominguez has not shown that he was legally entitled to a lesser included offense charge.

Finally, and most significant, there was substantial evidence of Dominguez's guilt at trial. Two eye witnesses testified at trial that Dominguez walked into the bar, proclaimed his intention to kill the victim, grabbed her by the hair, and shot her in the back of the head. Thus, Dominguez has not shown any reasonable probability that his counsel's alleged errors effected the outcome of his trial.

3. Prosecutor's Use of the Word "Murder"

This ground for relief was addressed by the state appellate court, which found that the error was not preserved for appeal because counsel's objection was not specific, and in the alternative found that the objection did not comport with the complaint raised on appeal. Where the state court declines to address a claim on the merits based on Texas's contemporaneous objection rule, the state decision rests on an adequate and independent state

procedural grounds, and the claim is not subject to federal court review. *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005).

In any event, Dominguez's claim fails on its merits. Federal habeas relief may be granted based on erroneous evidentiary rulings "only if the challenged evidence is a crucial, critical, or highly significant factor in the context of the entire trial." *Thomas v. Lynaugh*, 812 F.2d 225, 230-31 (5th Cir. 1987). In this case, Dominguez admitted that he shot the victim, and two eyewitnesses testified to the circumstances of the shooting. Thus, in the context of the entire trial, the prosecutor's use of the term "murder" when questioning the victim's daughter likely did not influence the jury's verdict.

4. Jury Charge Defining "Reasonable Doubt"

Dominguez complains that "reasonable doubt" was defined in the jury charge. In *Paulson v. State*, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000), the Texas Court of Criminal Appeals overruled its decision in *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991), requiring trial courts to instruct juries on the definition of "beyond a reasonable doubt." The *Paulson* decision held that the better practice is to give no definition at all, but noted it would not be reversible error to do so if the state and defense agree. *Id.* The *Paulson* court further recognized, citing *Victor v. Nebraska*, 511 U.S. 1 (1994), that the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so, as long as the jury is instructed that the state must prove the defendant's guilt beyond a reasonable doubt. Thus, Dominguez's objection based on *Paulson* does not raise a constitutional claim. Matters of purely state law are not cognizable on federal habeas review. *Brown v. Collins*,

937 F.2d 175, 182 n.12 (5th Cir. 1991) (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (only federal constitutional claims are cognizable in a federal habeas proceeding)).

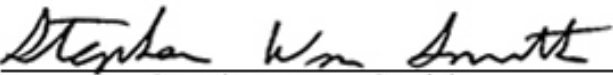
CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that Dominguez's petition be denied.

The court further finds that Dominguez has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on July 11, 2007.



Stephen Wm Smith
United States Magistrate Judge